

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARNETTE MIGUEL LEE,

Defendant-Appellant.

UNPUBLISHED

May 13, 2003

No. 237840

Berrien Circuit Court

LC No. 00-045300-FH

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant pleaded guilty to the charge of felon in possession of a firearm, MCL 750.224f, and was convicted by a jury of armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to 25 to 75 years' imprisonment for the armed robbery conviction, 25 to 75 years' imprisonment for the assault with intent to murder conviction, 2 to 5 years' imprisonment for the carrying a concealed weapon conviction, 2 years' imprisonment for the felony-firearm conviction, and 2 to 5 years' imprisonment for the felon in possession of a firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the prosecutor violated defendant's right to a fair trial by deliberately introducing evidence of defendant's guilty plea in violation of MRE 410. Defendant additionally contends that his trial attorney rendered ineffective assistance of counsel by failing to object to this improper evidence. We disagree.

We first note that, although defendant has framed this as an issue of prosecutorial misconduct, in reality defendant is challenging the admissibility of evidence. The evidence about which defendant complains was a police officer's testimony that he witnessed defendant in court "recently" admit that he possessed a firearm on November 26, 2000, the offense date. We further note that defendant failed to preserve his objection to this testimony for appellate review. Accordingly, in order to avoid forfeiture of this issue defendant must show a plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 410, which rule governs the admissibility of pleas, plea discussions, and related statements, states in pertinent part as follows:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) A plea of guilty which was later withdrawn;
- (2) A plea of nolo contendere
- (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas . .

In the present case, although defendant entered a guilty plea, this plea was never withdrawn. MRE 410, by its own unambiguous terms, applies only to the “foregoing” pleas, namely nolo contendere pleas and guilty pleas that are later withdrawn. Accordingly, contrary to defendant’s assertion, evidence of defendant’s admission, during his guilty plea, to the felon-in-possession charge was not barred by MRE 410. Therefore, because no error took place, defendant has failed to demonstrate a plain error that affected his substantial rights. Defendant is not entitled to a reversal of his convictions on this evidentiary basis. Moreover, because this evidence was not barred by MRE 410, the prosecution did nothing improper when it introduced this evidence and when it used the admission to support its arguments and theories of the case. Further, trial counsel’s failure to object to the prosecutor’s introduction and use of this evidence did not constitute ineffective assistance of counsel, because trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Reversal of defendant’s convictions is not warranted on grounds of prosecutorial misconduct or ineffective assistance of counsel.

Defendant next argues that the prosecutor denied defendant a fair trial when he intentionally introduced evidence of defendant’s gang affiliation because this evidence was inadmissible under MRE 401 and 403. Defendant additionally contends that trial counsel denied defendant the effective assistance of counsel by failing to object to the allegedly improper evidence. Once again, we disagree.

Again we note that, although defendant has framed this as an issue of prosecutorial misconduct, in reality defendant is challenging the admissibility of evidence, and we also note that defendant has failed to preserve this issue for appeal, thus requiring defendant to demonstrate plain error that affected his substantial rights in order to avoid forfeiture of the issue. *Carines, supra* at 763. MRE 402, which governs the admissibility of evidence generally, states that all relevant evidence is admissible. MRE 401 defines relevant evidence as that evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 403 provides that evidence that is otherwise relevant may, nonetheless, be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

In the present case, evidence of defendant’s gang affiliation clearly had some relevance. This evidence made it more or less probable than it would have been without this evidence that

defendant was the author of a letter received by Corey Duckett that appeared to implicate the author in the charged crimes, which in turn made it more or less probable that defendant committed the crimes. The letter had been sent to Duckett in an effort to convince eyewitness Jermaine Callahan not to testify. Under the circumstances, we find that the testimony regarding defendant's gang affiliation was relevant and, thus, was admissible under MRE 402.

However, we also find that the probative value of the evidence was outweighed by the danger of undue prejudice. Our Supreme Court has noted that unfair prejudice does not mean "damaging," because any relevant evidence will be damaging to a certain extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). Rather, unfair prejudice results when minimally probative evidence might receive consideration from the jury substantially out of proportion to the logically damaging effect of the evidence or when it would be inequitable to allow the use of the evidence. *Id.* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

In the present case, the challenged evidence clearly was not critically probative in the sense that it was the sole way to prove either that defendant wrote the inculpatory letter or that he committed the crimes with which he was charged. There were other ways to prove that defendant authored the letter, such as the evidence introduced by the prosecution that defendant's nickname was "Pookie" and the letter was signed "Pookie," that defendant usually referred to witness Jermaine Callahan as "Maine," a name referenced in the letter, that defendant was dating Callahan's sister LaToya at the time of his arrest and the letter stated that the writer loved "Toya," and that defendant was housed in the jail and the very dormitory from which the letter was sent at the time the letter was sent. Similarly, there were other ways to prove that defendant committed the charged crimes including, most damningly, the victim's in-court identification of defendant as the person who committed the acts against him. Thus, in the broad analysis, the evidence of defendant's gang affiliation was of marginal value.

At the same time, this evidence was also clearly prejudicial. Evidence of gang affiliation has long been treated cautiously by Michigan courts because of its recognized inherently prejudicial nature. See *People v Ho*, 231 Mich App 178, 183-184; 585 NW2d 357 (1998), and *People v Wells*, 102 Mich App 122, 129-130; 302 NW2d 196 (1981). Under the circumstances, we find that there was a high risk that this minimally probative evidence might receive consideration from the jury substantially out of proportion to the logically damaging effect of the evidence. Accordingly, the probative value of this evidence was substantially outweighed by the danger of undue prejudice, and the court's error in admitting this evidence was plain.

This determination, however, does not automatically entitle defendant to a reversal of his convictions. Rather, as stated above, defendant must also show that the error affected his substantial rights by affecting the outcome of the proceedings. *Carines, supra* at 763. We find that defendant has failed to make such a showing.

A substantial amount of evidence was introduced at trial, entirely apart from the evidence challenged here, linking defendant to the crimes with which he was charged. The victim himself testified at length, describing his attacker as someone with a beard and a goatee who was quite tall and who was wearing a brown jacket. He further identified defendant in-court as his attacker, while also stating definitively that Callahan, who had admitted being present at the crime scene, was not the perpetrator. In addition, another witness, at whose home the crimes

occurred, testified that on the day the crimes were committed she had seen defendant on her street and that defendant had been wearing a short brown leather jacket. A police officer who participated in the investigation of this case testified that, at the time defendant was questioned regarding the case, defendant had a mustache and a goatee. The police officer further advised the court that at the time he was arrested, defendant was wearing a short brown coat. Further, both Duckett and Callahan placed defendant near the scene around the time of the robbery and shooting, and Callahan, while perhaps somewhat lacking in credibility due to the constant changing of his testimony while on the stand, described in detail how he had witnessed defendant committing the charged crimes. Callahan further testified that on the date in question defendant had worn a brown coat. Given the strength of the prosecution's case against defendant, we find that defendant has failed to show that the court's error in admitting the challenged evidence affected his substantial rights by affecting the outcome of the proceedings. Accordingly, defendant is not entitled to a new trial on this evidentiary basis.

Moreover, for much the same reason, defendant also is not entitled to a reversal of his convictions on either prosecutorial misconduct or ineffective assistance of counsel grounds. Unpreserved challenges to prosecutorial misconduct, like unpreserved evidentiary challenges, are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). To be entitled to reversal on the basis of ineffective assistance of counsel, a defendant must demonstrate that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). As discussed above, defendant has failed to demonstrate that the court's error in admitting the challenged evidence affected his substantial rights by affecting the outcome of the proceedings. Defendant is not entitled to a reversal of his convictions on the grounds of either prosecutorial misconduct or ineffective assistance of counsel.

Defendant next argues that trial counsel denied him the effective assistance of counsel when he failed to object to improper testimony regarding where defendant was questioned by the police, regarding the fact that defendant was being held in connection with an unrelated crime at the time of this questioning, and regarding defendant's credibility. We disagree.

Once again, although defendant frames this as an issue of ineffective assistance of counsel, in reality defendant is challenging the admissibility of evidence. Moreover, defendant has failed to preserve this issue for appeal. Accordingly, to avoid forfeiture of this issue defendant must show plain error that affected his substantial rights. *Carines, supra* at 763.

With regard to Detective DeLand's testimony concerning where defendant was questioned, in essence defendant asserts that this evidence was inadmissible because it was irrelevant. As discussed above, MRE 402 provides that all relevant evidence is admissible, while MRE 401 defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

In this instance, it is clear that the challenged evidence was relevant. The location of defendant's interview was a subject of proper examination, as it involved the environment and circumstances surrounding the questioning of defendant. Contrary to defendant's assertion, the testimony indicated that he was interviewed in the second floor detective interview room at the

Sheriff's Department, not in the jail proper. There could not possibly be any prejudice that would attach to this testimony, and thus there was no error in its admission. Consequently, defendant is not entitled to a new trial on grounds of ineffective assistance of counsel because trial counsel is not required to advocate a meritless position. *Snider, supra* at 425.

With regard to DeLand's testimony concerning the fact that defendant was being held in connection with an unrelated crime at the time he was questioned, defendant has asserted that this testimony was not only irrelevant but also more prejudicial than probative and that it was, therefore, inadmissible. In this instance, the challenged testimony was clearly irrelevant, because it had no tendency to make the existence of any fact of consequence to the action more or less probable than it would be without the evidence. Accordingly, under MRE 401 this evidence was inadmissible. Defendant has identified plain error.

However, we find that defendant is not entitled to a new trial based on this error, because he has failed to show that it affected his substantial rights. In the first place, the case against defendant was very strong, while DeLand's improper reference to defendant's criminal history was brief and was not highlighted or used in any way by the prosecution.

Moreover, DeLand's testimony on this point was unresponsive and volunteered, and defendant has presented no evidence to suggest that the prosecution knew in advance that DeLand would inject such a statement into his testimony. With regard to such testimony, this Court has held that, in general, a volunteered and unresponsive answer to a proper question is not cause for reversal or mistrial unless the prosecutor was aware of the testimony and encouraged the witness to so respond. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990); *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). It is true that this Court has also stated that when an unresponsive remark is made by a police officer, this Court will scrutinize the statement to make sure the officer has not ventured into forbidden areas that may prejudice the defense, because police witnesses have a special obligation not to venture into such areas. *Holly, supra* at 415-416. Indeed, the Court has explicitly recognized that a police officer's volunteered and unresponsive answer to a proper question that offers inadmissible evidence tying a defendant to other crimes can be highly prejudicial. *Id.* at 416. However, this Court will not automatically reverse the conviction if there exists overwhelming evidence of the defendant's guilt, thereby making the error harmless. *Id.* Here, we determine the error was harmless. Accordingly, defendant is not entitled to a reversal of his convictions for this reason.

This result is further supported by this Court's holding in *People v Lumsden*, 168 Mich App 286; 423 NW2d 645 (1988). In *Lumsden, id.* at 296-297, this Court held that the defendant, on trial for felony murder, was not entitled to a mistrial when two witnesses, one a police officer, referred to the fact that the defendant had been involved in other homicides. This Court was persuaded by the fact that the remarks were "very fleeting and were not emphasized to the jury." *Id.* at 299. Considering that the improper comment in this case was equally as fleeting and unemphasized as those made in *Lumsden*, and the fact that the nature of the remark in this case was less prejudicial than those remarks made in *Lumsden* in that the nature of the unrelated crime for which defendant was incarcerated at the time of questioning was not disclosed, we find defendant is not entitled to a new trial on the basis of DeLand's unresponsive and volunteered statement.

Furthermore, defendant is also not entitled to a reversal of his convictions on the grounds of ineffective assistance of counsel in connection with this improper remark. Indeed, because defendant has not shown that this error affected the outcome of the proceedings, he has also failed to make the requisite showing that there was a reasonable probability that, but for counsel's error in not objecting to this evidence, the trial outcome would have been different. *Toma, supra* at 302-303.

Finally, with regard to DeLand's testimony concerning his perception of defendant's truthfulness during questioning by police, defendant has asserted that this testimony was inadmissible under Michigan law. In fact, Michigan case law does hold that it is improper for a witness to comment on the credibility of another witness, because matters concerning credibility are to be determined by the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, for the reasons detailed below we do not believe that defendant is entitled to a reversal of his convictions on this evidentiary basis.

In the first place, we are not convinced that DeLand's testimony on this point was improper under *Buckey* because, in the context of DeLand's full statement, the challenged testimony appears not so much to have been intended to be a comment on defendant's credibility as to be an explanation of how police obtained the particular version of events from defendant about which DeLand was now testifying. Under these circumstances, we believe that DeLand's testimony on this point may well have been proper.

Regardless of whether DeLand's testimony was proper, however, we nonetheless find that defendant is not entitled to a reversal of his convictions on this evidentiary basis because, although defendant may have identified plain error, the case against defendant was so strong that defendant has failed to show that the asserted error affected his substantial rights by affecting the outcome of the case. *Carines, supra* at 763. Accordingly, reversal is unwarranted.

Moreover, because defendant has failed to show that this alleged error affected the outcome of the proceedings, we further find that he is not entitled to a reversal of his convictions on the basis of ineffective assistance of counsel. *Toma, supra* at 302-303.

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Donald S. Owens